ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500004

MONDAY, THE TWENTIETH DAY OF DECEMBER
TWO THOUSAND AND TWENTY ONE

:Present:
Justice C.V. Nagarjuna Reddy, Chairman
Sri P. Rajagopal Reddy, Member
Sri Thakur Rama Singh, Member

O.P.No.65 of 2019

Between:

M/s. TGV SRAAC Limited,
(Formerly known as Sree Rayalaseema Alkalies
And Allied Chemicals Limited),
40-304, II Floor, K.J. Complex, Bhagyanagar,
Kurnool, rep. by its Vice President (Finance)
Mr. A. Venkat Rao S/o. Sharma, R/o. Hyderabad .. Petitioner

And

1. Transmission Corporation of Andhra Pradesh Ltd.,
   Rep. by its Chairman & Managing Director

2. The Southern Power Distribution Company of
   A.P. Ltd., Tirupati,, rep. by its Chairman &
   Managing Director

3. New & Renewable Energy Development Corporation
   of Andhra Pradesh (NREDCAP), rep. by its
   Vice-Chairman & Managing Director .. Respondents

This Original Petition having come up for hearing in the presence of Sri Alladi Ravinder, Counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondents and upon perusing the record and hearing the arguments of both the learned Counsel, the Commission made the following :

ORDER:

The petitioner filed this Original Petition under Section 86(1)(f) of the Electricity Act 2003 (for short "the 2003 Act") for a direction to respondent Nos.1 and 2 to give credit of about 73,68,610 units of wind power generated and evacuated into the Grid from 01-04-2016 to 07-06-2019 in the future energy bills of the petitioner.

The petitioner pleaded that it erected wind power generation units consisting of Site-1 with a capacity of 2 MW and Site-2 of 1 MW, totalling 3 MW, and entered into a wheeling agreement on 27-03-1996 with the then A.P. State Electricity Board for a period of 20 years. It has further pleaded that M/s. Rayalaseema Power Corporation Ltd. (RPCL) constructed the wind power generation units at Ramagiri village, Anantapur District consisting of Site-3 with a capacity of 0.945 MW and Site-4 with a capacity of 0.945 MW, totalling to 1.89 MW, and entered into a wheeling agreement on 28-03-1997 with the then A.P. State Electricity Board for a period of 20 years; that the said Corporation was merged into M/s. Rayalaseema Hi-Strength Hypo Ltd.

(RHHL) from which the petitioner acquired the units. That after the expiry of the term of the wheeling agreement, the respondents advised change of CTPT and metering equipment at both the ends for renewal of the wheeling agreements for the four wind farm units; that accordingly the petitioner completed the erection of CTPT and metering equipment of required class at both the ends under the supervision of officials of respondent Nos.1 and 2; that thereafter the petitioner filed the prescribed application by paying the requisite fee for renewal of the wheeling agreements so as to enable it to take credit of the power generated for captive use at its factory at Gondiparla, Kunrool with HT No.KNL 179; and that after completion of formalities, on 09-07-2019 four different Open Access agreements (intrastate short term) were entered with respondent No.2 for availing the wheeling services for the period from 07-06-2019 to 30-04-2020. It was further pleaded that the petitioner requested the respondents for giving credit on its monthly bills on account of power generated in Unit-I from April 2016 to May 2019, Unit-II from 01-04-2016 to 07-06-2019 and Units-III & IV from 01-04-2017 to 07-06-2019 and evacuated into the Grid as evidenced by the monthly meter readings; that as the respondents have not given credit to the power generated and evacuated into the Grid, the petitioner made representations stating that the delay in execution of the agreements was due to the acts of the respondents; that as required the CTPT and metering equipment was installed under the

supervision of the departmental officials, but the respondents refused to give credit to 7.3 million units evacuated into the Grid without agreement and that the same amounts to unjust enrichment on the part of respondent Nos.1 and 2 apart from being inequitable for a public utility. It was further pleaded that the petitioner never intended to supply power free of cost to the respondents; that as the evacuation of power into the Grid by the petitioner was with the knowledge of the respondents, the latter cannot throw the blame of absence of agreement during the relevant period on the petitioner contrary to the principle that a person who received the benefit of a non-gratuitous act is liable to pay the value of the benefit to the person who conferred it and that therefore it is the obligation on the part of respondent Nos.1 and 2 to give credit to the wind power generated and evacuated into the Grid by the petitioner's captive wind power units. The petitioner further pleaded that in a similar case in M/s. SIFLON Drugs Vs. A.P. Transco and others, vide order dated 31-03-2018 in O.P.No.30 of 2016, this Commission held that the banked energy shall be considered as deemed purchase.

Respondent No.2 filed a counter affidavit pleading that it has no knowledge or information of the petitioner taking over of M/s. Sree Rayalaseema Alkalies and Allied Chemicals Ltd. (SRAACL) on the unspecified date and year and that the petitioner is called upon to prove the same with complete details for setting up the claim about the power supplied

unauthorizedly by its predecessor company to the State Grid. It was further pleaded that the main grievance of the petitioner is that although admittedly there are no Open Access agreements after 26-03-2006 and 27-03-2017 in respect of 3 MW and 1.89 MW respectively since it has injected power into the Grid without authorization from any of the respondents and although Clause 10.4 of the APERC (Interim Balancing and Settlement Code) Regulation 2006 (Regulation No.2 of 2006) lays down that such power will not be accounted, still the petitioner need to be paid for such injected power. That as a matter of fact without Open Access agreement and without scheduling of power every day, any power injected into the Grid by the generator will not be accounted for; that the said position of law is clearly stated in 2006 Regulation; that there is a separate procedure for settlement of power for every month which has to be undertaken by both the parties together; that the A.P. Discoms are permitted through Retail Supply Tariff orders passed by the Commission every year as to the sources from where power has to be procured/purchased, including the cost of such power; that after settlement of aggregate revenue of each year, the Discoms are not permitted to collect the amounts from the consumers unless such future liability is notified; that as far as the present issue is concerned, no such prior notification is given; that as such the issues already settled cannot be permitted to be reopened; that the respondents have no source to fill the gap that may arise if the claim of the petitioner is

accepted; that as per the 2003 Act the Discoms are to run on commercial principles and that therefore the present O.P. has no merits for consideration.

In reply to paras 1 to 4 it was pleaded that except the fact that the Open Access agreements expired in 2016 and 2017, all the other aspects pleaded by the petitioner are not in the knowledge of the respondents and that the petitioner is put to strict proof of the same. That as far as the arrangement of ABT meters is concerned, the same is the legal obligation of every Open Access generator and therefore the delay occurred in complying with the same is solely attributable to the petitioner but not the respondents; and that as per the present practice, the generator has to arrange ABT meters at both ends i.e., Entry and Exit points;.

In reply to para-5, it was pleaded that the generator has filed STOA application on 17-12-2018 and entered into STOA agreement on 9-7-2019 for the period from 07-06-2019 to 30-04-2020; that the delay occurred on the part of the generator in procuring and installing the ABT meters and that the said delay is not on the part of the respondents.

In reply to para-6, it was pleaded that after the expiry of the earlier agreements RPCL did not approach the respondents-authorities for exporting power to the Grid; that the respondents never requested RPCL to export power to the Grid; that without having PPA with respondent No.2, the

generator reported to have injected power into the Grid; that as respondent No2. has got sufficient power to meet its demand, power from SRAACL was not at all required for respondent No2; that without taking consent from the respondents, the generator reported to have injected power into the Grid; and that being silent for 3 to 4 years of such injection of power, finally the petitioner has approached respondent No.2 for Open Access by filing STOA application on 17-12-2018.It was further pleaded that the application of the petitioner was processed and STOA was entered on 09-07-2019; that from the date of expiry of the wheeling agreements till the date of filing of the present O.P., the petitioner has not requested the respondents for exporting power from its units to the Grid; that being silent for 3 to 4 years, surprisingly the petitioner filed the present O.P. claiming charges for the unauthorized power exported to the Grid which is not tenable in law; that the generator had reported to have exported power without complying with any of the provisions of Open Access Regulations, and without having permission/agreement with the respondents and claiming payment towards such unauthorizedly injected power for the period from the expiry of the agreement upto entering into STOA; and that therefore the principle of law as to non-gratuitous act is not applicable.

In reply to the reliance placed by the petitioner on the order dated 31-03-2018 of this Commission in OP No. 30 of 2016 (M/s. SIFLON Drugs Vs. A.P. Transco and others) it was pleaded that the said case is different from the

present case; that M/s. ITW Signode India entered into wheeling agreement with APSEB on 31-03-1995 valid upto 22-05-2015 in respect of 1 MW wind power project for captive purpose set up at Ramagiri in Anantapur District; that the project was later transferred to M/s. Signode India Ltd. on 23-03-2015 before expiry of the wheeling agreement; that M/s. Signode India Ltd. have applied or LTOA on 01-05-2015 before expiry of the said wheeling agreement, that due to delays occurred in providing ABT meters by the generator, LTOA was entered on 15-06-2016; that however, the Commission has instructed respondent No.2 to give credit for the power exported by the wind power generator during the period between 23-03-2015 and 14-06-2016; that M/s. Signode India Ltd. has approached the respondents before expiry of their wheeling agreements; and that since the petitioner had reported to have supplied power contrary to the provisions of law, it is not entitled for any part of the claim.

In the rejoinder filed, in reply to paras 3 to 6, the petitioner admitted that there was no Open Access agreement subsisting during the period between April 2016 and May 2019. It was however pleaded that the respondents have without any objection allowed the petitioner's generating stations to inject power into the Grid which is evidenced by the meter readings taken by the officials of the respondents and therefore the respondents cannot be permitted to take a U-turn and claim that they have surplus power which is highly

objectionable and the same is liable to be deprecated. That the claim of the respondents that they have surplus power is also denied for the reason that no substantial evidence is produced by them in that regard; that the respondents having consumed the power wheeled by the petitioner cannot refuse to give credit to the same; that the petitioner is seeking the relief of adjusting the injected units into the Grid in its industry bill subject to payment of charges; that the petitioner has paid the maintenance charges as demanded by the respondents and the same is evidenced by letter dated 22-11-2018 issued by the Accounts Officer, OMC Circle, Ananthapuram; that the intervening period was due to non-renewal of Open Access agreement and also due to upgradation of the metering system; that after long persuasion with the officials of the respondents, the required CTPT meters were fixed and STOA contract was entered on 09-07-2019; that as the petitioner's industry requires power, it has established captive generation units and that the respondents, having utilized the same, are bound to adjust the injected units into the Grid.

In reply to paras 7 to 11 of the counter affidavit, the petitioner denied that there was delay on its part in fixing the ABT meters and pleaded that the respondents are put to strict proof of the same; that the correspondence itself shows that there was delay on the part of the respondents in giving the required clearances; that before expiry of the term of agreement, on

18-3-2016 the petitioner addressed a letter to the respondents for entering into fresh agreements; that the petitioner has made several representations to the respondents besides requesting the State Government for giving directions to the respondents as the supply of power was not intended to be gratuitous but the respondents have shown supine attitude towards the petitioner company in adjusting the injected energy; that the respondents cannot deny the right of adjustments of units supplied during the non-contract period and the same amounts to undue enrichment on the part of the respondents.

It was further pleaded that the respondents have not specifically denied the injection of power by the petitioner into the Grid and that the respondents having voluntarily accepted the power generated and injected by the petitioner and also having recorded the same regularly with the signatures of its officials, the petition is liable to be allowed. The petitioner relied on the decision of the Hon'ble Supreme Court in State of West Bengal Vs. B.K. Mondal and sons (AIR 1962 SC 779) to buttress its plea that being a non-gratuitous supplier and the respondents having accepted the power injected by it into the Grid, the petitioner is entitled to be compensated by the respondents.

Respondent No.2 filed an application for amendment of the counter affidavit. It was pleaded in the said application that the main claim of the petitioner is that there was delay in granting open access and that therefore it is entitled to be compensated for the power injected by it into the Grid. It was

further pleaded that though there was absolutely no delay in granting the open access, the petitioner has deliberately not given the date of its application and the date of approval of the open access; that though the respondent has given the date of application and the date of approval of open access, due to change of type of open access there occurred a mistake in stating the approved date of STOA; that in fact as per the record, the short term application was filed on 03-06-2019 and the same was approved on 07-06-2019; that however the STOA agreement was entered on 09-07-2019 w.e.f. 07-06-2019 upto 30-04-2020; that as a matter of fact though the petitioner has claimed that it has applied for LTOA on 27-08-2018, respondent No.1 has received only the covering letter without the required application and the required demand drafts and therefore the same was not considered; that for the first time the petitioner has applied for LTOA on 23-01-2019 in the required format but the same was denied for want of necessary particulars; that ultimately the petitioner has filed the application for STOA on 03-06-2019 with the SLDC and the same was approved on 07-06-2019 without any delay; that the petitioner has deliberately not impleaded the APSLDC in the O.P. and that there are two different authorities for approval of LTOA and STOA. It was further pleaded that the amended counter is being filed during the lockdown period after personal discussion with its Counsel for clarifying the different dates of applications filed by the petitioner seeking open access and the date

ultimately when the STOA was granted well within the time. It was further pleaded that though the pleadings are complete, the petitioner has not commenced its arguments and that therefore no prejudice will be caused to the petitioner if the amendment of counter is permitted to bring the correct facts on record which the petitioner ought to have submitted in its O.P.

The petitioner filed a reply to the application for amendment of the counter affidavit filed by respondent No.2 wherein it was pleaded that respondent No.2 is intending to amend the counter affidavit dated 13-06-2020 without following the procedure; that the application for amendment is vague as it is not clear whether respondent No.2 intends to add an additional paragraph to the counter or it intends to effect changes in the counter affidavit filed and that therefore the application for amendment of the counter affidavit is liable to be dismissed. It was further pleaded that as early as 18-03-2016 the petitioner made a representation for renewal of wheeling agreement; that as the Metering systems procedure was changed, the petitioner was asked to change the existing metering system with higher accuracy CT, PT and metering equipment on account of open access system; that though the execution of the wheeling agreement was delayed, the evacuation of power into the Grid was never stopped; that the evacuation of power into the Grid is within the knowledge of the respondents as they had acknowledged the receipt of power; that the respondents have not denied the evacuation of

power into the Grid by the petitioner and that the respondents have raised flimsy grounds to delay the legitimate adjustment of energy units to the petitioner which is nothing but abuse of process of law. It was further pleaded that vide representation dated 27-08-2018 the petitioner had specifically requested renewal of the wheeling agreement by entering into LTOA duly enclosing the formats along with necessary fee by way of Demand Draft Nos.605027 to 605030 dated 18-08-2018 drawn on Indian Bank, Kurnool; that the said applications along with the D.Ds. were returned for submission of additional documents and for paying the maintenance charges and that accordingly the petitioner paid the maintenance charges of Rs.5,11,903/- which the respondents acknowledged. That on 09-01-2019, respondent No.1 issued a letter requiring the petitioner to submit the relevant documents and details and the petitioner complied with the same on 23-01-2019 under a covering letter; that it appears that the CGM (HRD & PLG) of respondent No.1 vide letter dated 31-01-2020 sought feasibility report on the petitioner-company for grant of long term intrastate open access from the CGM of respondent No.2; and that the SE/OMC, Ananthapuram of the A.P. Transco vide his letter dated 11-03-2019 has submitted the feasibility report to the CGM of respondent No.2 along with the relevant documents. It was further pleaded that the LTOA was neither denied nor returned for want of necessary particulars as alleged by respondent No.2 in its application for

amendment of the counter affidavit; that the petitioner was forced to apply for STOA on 03-06-2019 in addition to the earlier application dated 31-08-2018 as there was no option due to delay in according the permission for entering into LTOA for its captive generation and that on 07-06-2019 the STOA permission was accorded. That there was no delay on the part of the petitioner-company in pursuing the permission for entering into LTOA/STOA and in fact as early as 31-08-2018 the petitioner-company submitted its application for STOA to the Executive Director, SLDC by marking a copy to the CGM of respondent No.2 and as such the petitioner-company has approached the respondents for according permission for either LTOA or STOA for their captive generation units at Ramagiri, Ananthapuram. It was further pleaded that the present dispute is for adjustment of the units evacuated into the Grid by the petitioner and that the A.P. Transco and APSPDCL are the competent authorities in this regard; that APSLDC is a part and parcel of A.P. Transco; that the petitioner brought to the notice of the Principal Secretary to the Government on 10-09-2018 and 27-09-2018 regarding the execution of open access agreements and that only to drag on the proceedings and to delay the legitimate right of the petitioner, the respondent No.2 has filed the application for amendment of the counter affidavit.

In the additional reply filed by the Chief Engineer, Power Systems, Planning & Design, A.P. Transco, it was pleaded that except the date of grant

of STOA, the claim of the petitioner that it has submitted applications in the year 2016 and 2018 for LTOA and STOA as per the format specified in the Regulations to the concerned authorities and that the respondents have delayed the approval,have been denied. It was further pleaded that prior to the enactment of the 2003 Act and the APERC (Terms and Conditions of Open Access) Regulation 2005 (Regulation No.2 of 2005), the petitioner together with its predecessor had wheeling agreements as per the earlier electricity laws; that as per the Regulation No.2 of 2005, the wheeling agreements entered earlier by the petitioner continue to be in force till the expiry of such agreements; that the wheeling agreements of the petitioner expired in 2016 and 2017; that thereafter the law did not permit the renewal of wheeling agreements and every generator who wants to avail the power for their captive use or for supply to third parties have to comply with the Open Access Regulations in the prescribed formats and should have the required metering equipment; that even according to the petitioner, it has made the representation on 18-03-2016 for renewal of the wheeling agreements which is not permissible in law and that the same was informed to the petitioner. It was further pleaded that as per Clause 10.4 of Regulation No.2 of 2006, unless there exists a power purchase agreement or open access agreement, the power injected into the Grid by any generator amounts to unauthorized supply and shall not be accounted for and that the Hon'ble APTEL on more

than one occasion held that in the absence of a valid PPA or Open Access agreement, any injection of power into the Grid is unauthorized and the same is dangerous to the safety of the Grid and that such power shall not be paid for. It was further pleaded that the claim of the petitioner that it has submitted representation dated 27-08-2018 for renewal of wheeling agreement by entering into LTOA along with necessary fee is factually incorrect; that respondent No.1/A.P. Transco which is the Nodal Agency has not received any such application dated 27-08-2018 and the petitioner is called upon to submit evidence in support of the said claim. That according to the petitioner it has submitted letter dated 10-09-2018 to the Principal Secretary to the Govt. of A.P., but the respondents have received such representation only on 19-11-2018; that subsequently vide letter dated 09-01-2019, the respondents replied to the petitioner clearly stating that they have not received any application dated 27-08-2018 for LTOA as claimed by the petitioner and requested the petitioner to submit the LTOA application as per the procedures specified in Regulation No.2 of 2005; that thereafter the petitioner, for the first time, submitted its LTOA application dt.23-01-2019 and the same was processed for getting the field feasibility; that the feasibility report was received on 15-06-2019 and thereafter the petitioner was informed vide letter dated 08-08-2019 to fulfill certain conditions like providing SCADA, QCA, Common Metering point at the Entry point, but the petitioner did not turn up for

processing the file and has not submitted any information about the setting up of the SCADA etc., till date; that it was learnt that the petitioner submitted letter dt.31-08-2018for STOA with APSLDC; and that ABT meters were also required to be set up by the generator for grant of approval of LTOA but the same was also not set up by the petitioner.

It was also further pleaded that the petitioner has submitted four applications dt.31-08-2018 to the APSLDC seeking STOA for intrastate (captive); that since the required metering equipment was not set up, the said application could not be considered; that finally after establishing the required meters etc., the petitioner submitted applications dt.03-06-2019 for STOA and the same was approved on 07-06-2019 and that even then the petitioner entered into STOA agreement on 09-07-2019. It was further pleaded that although the petitioner has claimed delay on the part of the APSLDC which is a separate entity as per Section 31(1) of the Act, the petitioner has not made it a party to the proceedings and that merely because A.P. Transco is operating the APSLDC as per Section 31(2), it cannot be said that the APSLDC is not a necessary party to the proceedings and therefore the Petition is bad for non-joinder of the necessary party.

It was further pleaded that as per Clause 10.6 of Regulation No.2 of 2005, as amended by Regulation No.1 of 2016, when there is a delay on the part of the Nodal Agency/Transco in granting approval of LTOA, such

applications are deemed to have been allowed Open Access in terms of such applications and therefore if the petitioner had submitted applications as required under the relevant Regulations and if there was no response from the respondent, nothing prevented the petitioner from giving the Schedule by availing such deemed approval. It was further pleaded that since the 2003 Act is a self contained code, the same does not permit invocation of Section 70 of the Indian Contract Act; that the Hon'ble APTEL has upheld the said principle of law and that the Judgment of the Hon'ble Supreme Court relied upon by the petitioner is not applicable to the facts of the case.

Having regard to the respective pleadings of the parties, the following Points emerge for adjudication :

1. Whether there was delay on the part of respondent No.1 in granting Open Access to the petitioner ?

2. Whether in the absence of Open Access agreement and Scheduling given by the petitioner, injection of power into the Grid is lawful ?

3. Whether the petitioner is entitled to the payment for the power injected into the Grid from the time of expiry of the wheeling agreements upto the grant of Open Access to it ?

Re Point No.1: SRAACL developed two power generating units comprising site-1 with a capacity of 2 MW and site-2 with a capacity of 1 MW and entered into a wheeling agreement on 27-03-1996 with the erstwhile A.P. State

Electricity Board for a period of 20 years. The petitioner claims that SRAACL has been changed as TGV SRAAC Ltd., the petitioner herein. It is the further case of the petitioner that RPCL has developed two wind power generating units comprising site Nos.3 and 4 with capacities of 0.945 MW each at Ramagiri village, Anantapuram District and that the said company has entered into a wheeling agreement on 28-3-1997 with the erstwhile A.P. State Electricity Board for a period of 20 years. That RPCL was merged into RHHL from which the petitioner claimed to have acquired the units. In the Original Petition, the petitioner claimed that on the advise of the respondents, the petitioner has changed the CTPT and metering equipment at both the ends for the purpose of renewal of wheeling agreements; that after completing erection of the same, the petitioner filed the prescribed application by paying the requisite fee for renewal of the wheeling agreements so as to enable it to take credit of the power generation for captive use at its factory at Gondiparla, Kurnool District and that after completion of the formalities, four different Open Access agreements (intrastate short term) were entered with respondent No.2 on 9-7-2019.

In the counter affidavit of respondent No.2, it was pleaded that the petitioner has filed applications for STOA on 17-12-2018 and entered into agreements on 9-7-2019 for the period from 7-6-2019 to 30-4-2020 and that the delay has occurred on the part of the petitioner only in procuring and

installing the ABT meters and that there was no delay on the part of the respondents in granting the STOA. In its rejoinder, the petitioner denied that there was delay in fixing the ABT meters; that the correspondence itself shows that there was delay on the part of the respondents in giving the required clearances; and that the petitioner has made several representations to the respondents for entering into fresh agreements.

Respondent No.2 filed an application for amendment of the counter affidavit which is resisted by the petitioner in its reply. The Commission, by a separate order, has allowed the said application. Respondent No.2 pleaded in the said application that the whole basis for the petitioner's claim for crediting the power injected prior to the grant of Open Access was the alleged delay in granting Open Access by the respondents; that the petitioner has deliberately not given the date of its application and the date of approval of the Open Access; that a mistake occurred in the counter as regards the date of approval of STOA; that the application for STOA was filed on 3-6-2019 (not on 17-8-2018 as stated in the counter) and that the same as approved on 7-6-2019 but the STOA agreements were entered on 9-7-2019 w.e.f. 7-6-2019 upto 30-4-2020. As regards the LTOA applications, it has been averred that though the petitioner has claimed that it has applied for LTOA on 27-8-2018, respondent No.1 received only the covering letter without the required applications and the required Demand Drafts and that therefore the same was

not considered; that for the first time, the petitioner has applied for LTOA on 23-01-2019 in the required format but the Open Access was denied for want of necessary particulars and that ultimately the petitioner has filed the applications for STOA on 3-6-2019 with the SLDC and the same was approved on 7-9-2019 without any delay. Respondent No.2 has reiterated that there was absolutely no delay on the part of the respondents in granting or entering into STOA agreements.

In the reply filed to the application for amendment of the counter affidavit, the petitioner averred that as early as 18-3-2016, it has made a representation for renewal of the wheeling agreement; that as the metering systems procedure was changed, the petitioner was asked to change the existing metering scheme with higher accuracy CTPT and metering equipment on account of Open Access system; that though the execution of the wheeling agreements was delayed, the evacuation of power into the Grid was never stopped and that the same was within the knowledge of the respondents as they had acknowledged the receipt of power. The petitioner further pleaded that vide their representation dated 27-8-2018, it has specifically requested renewal of the LTOA wheeling agreement duly enclosing the formats along with necessary fee by way of Demand Drafts drawn on Indian Bank, Kurnool on 18-8-2018 and that the said applications along with the Demand Drafts were returned for submission of additional documents and for payment of

maintenance charges and accordingly the petitioner paid the maintenance charges of Rs.5,11,903/- which the respondents have acknowledged. It was further averred that on 9-1-2019, respondent No.1 issued a letter requiring the petitioner to submit the relevant documents and details and the petitioner complied with the same on 23-1-2019 under a covering letter; that it appears that the CGM (HRD&PLG) of respondent No.1 vide letter dated 31-1-2019 sought feasibility report on the petitioner's company for grant of intrastate LTOA from the CGM of respondent No.2; that the SE/OMC, Anantapuram of respondent No.1 vide his letter dated 11-3-2019 has submitted the feasibility report of CGM of respondent No.2 along with the relevant documents; that the LTOA was neither denied nor returned for want of necessary particulars as alleged by respondent No.2 in its application for amendment of the counter affidavit and that the petitioner was forced to apply for STOA on 3-6-2019 in addition to the earlier application dated 31-8-2018 as there was no option due to delay in granting the permission for entering into agreements for LTOA for its captive generation and that on 7-6-2019 STOA permission was granted.

Prior to the advent of the 2003 Act, the erstwhile Electricity Boards used to allow the independent generators to evacuate their power by entering into wheeling agreements. Section 42 of the 2003 Act has introduced the concept of non-discriminatory Open Access to the transmission system for use by certain categories including a generating company on payment of

transmission charges. In discharge of its functions, to introduce Open Access as envisaged under Section 42(2) of the 2003 Act and in exercise of its powers under Section 181(1) thereof, the erstwhile Commission made Regulation No.2 of 2005. Under Clause 7.2 of the said Regulation, the existing users other than the existing distribution licensees may continue to avail themselves of the wheeling facility as per the existing agreements for the periods specified in those agreements to the extent they are not inconsistent with the 2003 Act and the Regulations. The Regulation has inter alia nominated State Transmission Utility (STU) as the Nodal Agency for LTOA transactions and SLDC for STOA transactions. Clause 10 of the said Regulation envisaged the procedure for filing of application for LTOA and Clause 11 thereof prescribed the procedure for filing of application for STOA. An application for LTOA shall be filed with the STU while the application for STOA shall be filed with the SLDC with copies to the concerned transmission/distribution licensees. Under Clause 13, all the LTOA and STOA users shall provide special energy meters capable of measuring active energy, reactive energy, average frequency and demand integration in each 15 minute time block with a built-in calendar and clock and conforming to BIS/CBIP Technical Report/IEC standards at all entry and exit points. In cases of LTOA, Clause 10.6 provides for carrying out system studies in consultation with other agencies and if it is determined that LTOA can be allowed without further

system strengthening, the Nodal Agency shall within 30 days of the closure of a window, intimate the applicants of the same. Under the proviso to Clause 10.6, in the absence of response or intimation from the Nodal Agency to the applicant within 30 days of closure of a window, such application shall be deemed to have been allowed Open Access by the Nodal Agency in terms of such application. Under Clause 10.7, if on the basis of the results of system studies, the Nodal Agency is of the opinion that the LTOA sought cannot be allowed without further system strengthening, the Nodal Agency shall notify the applicants of the same within 30 days of closure of a window. This clause envisages further steps for carrying out the system studies and the probable time frame for execution of the works for allowing the Open Access, the details of which need not be discussed herein.

From the material filed by the petitioner along with the O.P., it is evident that on the eve of expiry of the wheeling agreement for 3 MW wind plants, SRAACL addressed a letter on 18-3-2016 to the SE/Operations of respondent No.2 requesting the latter to make necessary arrangements for entering into fresh wheeling agreement with the same terms and conditions as were envisaged in the said expiring agreement. In the light of the changed procedure brought out by the 2003 Act and the Regulations framed by the Commission, the respondents have rightly pleaded that such a request for entering into fresh wheeling agreement is not sustainable and consequently

the said letter cannot be said to be in conformity with the legally prescribed procedure for claiming either STOA or LTOA.

The next correspondence in sequence filed in the O.P. by the petitioner is its letter dated 27-8-2018 for all the four wind plants which refers to their letter dated 6-2-2017. This letter shows that the petitioner has pleaded erection of CTPT metering equipment of required class at both ends under the supervision of the A.P. Transco and APSLDC officials. The letter also shows that the petitioner is enclosing the application formats (four in number) for grant of LTOA by paying the requisite fees by way of D.Ds. drawn on Indian Bank, Kurnool. The letter however requested for arranging renewal of agreement to enable them to take credit of the power generated for their captive use and that once the agreement is completed the petitioner will consume the entire power available within a period of one month. The copies of the purported LTOA applications were not filed along with the said letter as material papers. It is only after respondent No.2 has filed the application for amendment of the counter affidavit wherein it has specifically denied respondent No.1 receiving any application for LTOA and the Demand Drafts except the covering letter that the petitioner has chosen to file the purported four LOTA applications along with copies of the Demand Drafts. Significantly, the petitioner failed to file any acknowledgements evidencing receipt of those applications by respondent No.1. Clause 10.3 of Regulation No.2 of 2005

clearly provides for the Nodal Agency acknowledging the receipt of the applications within 24 hours of the receipt of the applications. As noted above, the petitioner has neither filed such acknowledgment nor pleaded that respondent No.1 has failed to give any acknowledgement. Thus the petitioner's plea that it has made LTOA applications to the Nodal Agency on 27-8-2018 is not supported by the required legal proof and is therefore liable to be rejected as unsubstantiated. The petitioner has accordingly failed to prove that it has made its applications for LTOA in terms of Regulation No.2 of 2005 and it cannot therefore blame the respondents for their alleged failure to enter into agreements for LTOA with it.

In this context, the proviso to Clause 10.6 of Regulation No.2 of 2005 deserves a mention. Clause 10.6, along with the proviso, reads as under :

"Based on system studies conducted in consultation with other agencies involved including other Licensees, if it is determined that Long-Term open access sought can be allowed without further system strengthening, the Nodal Agency shall, within 30 days of closure of a window, intimate the applicant(s) of the same .

"Provided that in the absence of any response or intimation from the Nodal Agency to the applicant within 30 days of closure of a window, then such application shall be deemed to have been allowed Open Access by the Nodal Agency in terms of such application."

From the above Clause, it is clear that where the Nodal Agency determines that the LTOA sought cannot be allowed without further system strengthening, it shall within 30 days of closure of a window, intimate the applicant of the same. Under the proviso thereof, in the absence of any response or intimation from the Nodal Agency to the applicant within 30 days of the closure of a window, then such application shall be deemed to have been allowed Open Access by the Nodal Agency in terms of such application. It is not the pleaded case of the petitioner that it has exercised its right under the above extracted proviso to Clause 10.6. If the plea of the petitioner that it has submitted its application for LTOA to the Nodal Agency with the requisite compliance is correct, it did not explain any reason for not invoking the proviso to Clause 10.6.

The specific case of the respondents is that for the first time the petitioner has applied for LTOA on 23-1-2019 in the required format; that the same was not considered for want of necessary particulars and that ultimately the petitioner filed STOA applications on 3-6-2019 with the SLDC which has approved the same on 7-6-2019 without any delay on their part. The petitioner however pleaded that it has made its first applications for STOA on 31-8-2018 itself and that however it was forced to make a fresh application on 3-6-2019. The petitioner failed to discharge this burden. The copies of the purported applications have been filed for the first time along with the reply to

the amendment petition. A perusal of these applications shows that as in case of LTOA applications, they are not supported by acknowledgement of SLDC. If the petitioner has filed such applications, the burden lines on it to explain as to what compelled it to make a fresh application for STOA on 3-6-2019. Therefore, we do not feel persuaded to accept the plea of the petitioner that it has made the first set of applications for STOA on 31-8-2018. Once the purported applications are eschewed from consideration, there remain applications dated 3-6-2019 in respect of which permission for entering into STOA was granted on 7-6-2019 i.e., within four days of making the STOA applications. There is thus no delay whatsoever in approving the STOA applications and entering into agreements therefor.

As regards LTOA, it is the pleaded case of the respondents that for the first time the petitioner filed LTOA applications on 23-1-2019 in the required format. Even the petitioner, in its reply to the amendment petition, clearly admitted that in pursuance of the letter dated 9-1-2019 of respondent No.1, it has submitted the relevant documents and details only on 23-1-2019 along with a covering letter. This admission will suffice to hold that the period prior to 23-1-2019 is liable to be ignored in the absence of relevant documents filed and proper details furnished. On the petitioner's own further admission, its application for LTOA was duly processed by respondent No.1 with its CGM (HRD&PLG) addressing letter dated 31-1-2019 to the CGM, APSPDCL

seeking feasibility report for grant of LTOA and on 11-3-2019, the SE/OMC, Anantapuram of respondent No.1 has submitted the feasibility report to the CGM of respondent No.2 along with the relevant documents. However, according to the respondents, as pleaded in their additional reply, respondent No.1 has received the feasibility report on 15-6-2019 and that vide their letter dated 8-8-2019, the petitioner was informed to fulfill certain conditions like providing SCADA, QCA, Common Metering Points at Entry Point, but the petitioner did not comply with the said conditions and pursue the applications and meanwhile it has submitted the STOA applications on 3-6-2019. Though the petitioner, in its pleadings projected the grievance that due to the delay in approval of the Open Access applications there was delay in entering into the agreements, Sri P. Sri Raghuram, learned Senior Counsel for the petitioner has not pressed this plea during his submissions. Indeed, the petitioner has not come clean on the aspect of the alleged delay on the part of the respondents in granting Open Access, either long term or short term, except making certain generic allegations which remained unsubstantiated as observed hereinbefore. We could not find any contemporaneous correspondence attributing delays on the part of the respondents by the petitioner in this regard. This is the obvious reason for the learned Senior Counsel not pressing this plea during his submissions. We are therefore of the opinion that the petitioner failed to drive home its plea that there was delay

on the part of the respondents in approving the applications for grant of LTOA or STOA by adducing positive evidence. This Point is accordingly answered against the petitioner and in favour of the respondents.

Re Point No.2 :Sri P. Sri Raghuram, learned Senior Counsel for the petitioner argued that the petitioner was holding wheeling agreements under which it was transmitting its captive power through the respondents' network; that the said activity continued even after the expiry of the wheeling agreements and that therefore continuing the activity of injection of power before the grant of STOA cannot be said to be illegal or unauthorized. It is the specific case of the respondents that admittedly during the period from 1-4-2016 to 7-6-2019, there was neither a PPA nor a subsisting Open Access agreement and therefore unauthorized injection of power during that period cannot be countenanced in law apart from such injection endangering the safety of the Grid. It is not the pleaded case of the petitioner that on the eve of expiry of the wheeling agreements it has approached the respondents with the Open Access applications. It is worthy to note that the concept of Open Access was in vogue at least from 2005 when the Commission has framed Regulation No.2 of 2005. Eleven years passed by before the wheeling agreements of the petitioner expired. The petitioner being a corporate entity is expected to be aided by highly qualified officers/advisors. Instead of making applications for Open Access, the petitioner has naively addressed letter dated 18-3-2016 to

the SE/Operations of respondent No.2 for making arrangements for entering into fresh wheeling agreement. Even an illiterate in the place of the petitioner would have taken appropriate legal advise and refrained from addressing such a letter. In fact, under Regulation No.2 of 2005, neither respondent No.2 nor its officials were competent to receive the requests for Open Access as it is only respondent No.1 or the SLDC who were competent to receive the applications for LTOA or STOA respectively. The petitioner appears to have abandoned the LTOA applications. However, it has merrily continued to inject power without even informing the SLDC, which is the apex body to ensure integrated operation of the power system in the State under Section 32 of the 2003 Act. Its functions inter alia include the responsibility for optimum scheduling and dispatch of electricity within the State in accordance with the contracts entered into with the licensees or the generating companies operating in the State, monitoring Grid operations, exercising supervision and control over the intrastate transmission system and carrying out real time operations of the Grid control and dispatch of electricity within the State through secured and economic operation of the State Grid in accordance with the Grid standards and State Grid Code.

At this juncture, it is relevant to discuss the Judgments of the Hon'ble APTEL relied upon by the learned Standing Counsel for the respondents.

In Renew Wind Energy (AP) Pvt. Ltd. Vs. Karnataka ERC (Appeal No.117 of 2016, dt.3-9-2017), the Hon'ble APTEL inter alia held as under :

"From the combined reading of the above provisions and decision of the State Commission, it is clear that the Appellant was not supposed to inject power into the grid without commercial agreement and without prior consent of SLDC. Injection of power without permission from of SLDC tantamount to grid indiscipline due to which grid security may be compromised. Although in present case the quantum of power injected is low but it is a matter of grid discipline if violated by the many generators at a time may result in insecure grid operation. Grid indiscipline cannot be allowed whether it is renewable power or conventional power. SLDC was supposed to communicate to the Appellant about the outcome of its LTOA application within 30 days from its receipt. The same was not done by SLDC. However, the State Commission has accepted the reasons for delay in processing the LTOA application of the Appellant based on submissions made by KPTCL. The State Commission has also compensated the Appellant for power injected by it beyond 8.8.2013 and the Respondent Nos.3 & 4 have paid the requisite amount." (Emphasis added)

The same view as above was taken by the Hon'ble APTEL in Kamachi Sponge & Power Corporation Ltd. Vs. Tamil Nadu Generation and Distribution Corporation Ltd. (Appeal No.120 of 2016 and I.A.No.272 of 2016, dt.8-5-2017) wherein it was held as under :

"From the combined reading of all the above provisions and the communications exchanged between the Appellant and the Respondent No.1 it is clearly established that the Appellant has pumped the energy on its own

without entering into any contract with Respondent No.1 and without the knowledge/schedule from SLDC. The energy pumped into the grid during the period under dispute by the Appellant is unauthorised and does not call for any payment by the Respondent No.1." (Emphasis added)

In M/s. Indo Rama Synthetics (I) Ltd. Vs. Maharashtra Electricity Regulatory Commission (Appeal No.123 of 2009, dt.16-5-2011) the Hon'ble APTEL, at paras-7 and 8, held as under :

"……..We are in agreement with the contentions of the SLDC and the observation of the State Commission in the impugned order. Admittedly, in this case power has been injected by the appellant primarily during the off peak hours. Moreover, the power generated by the appellant on liquid fuel is expensive. The expensive power was injected by the appellant without any schedule, contract or agreement or knowledge of the SLDC and the distribution licensee. The appellant has also not been able to cite any sections of the 2003 Act, rules or regulations which would entitle him to any compensation for the injection of power without any schedule and agreement.

Unlike other goods electricity cannot be stored and has to be consumed instantaneously. The generating plants, interconnecting transmission lines and sub-stations from the grid. State grids are interconnected to form Regional Grids and interconnected regional grids form the National Grid. The SLDC prepares the generation schedule one day in advance for the intra-state generating station and drawal schedules for the distribution licensees based on the agreements between the distribution licensee and the generators/trading licensees, declared capacity by the generators and drawal schedule indicated by the distribution licensees. The generators and the

licensees are expected to follow the schedule given by the SLDC in the interest of grid security and economic operation. If a generator connected to the grid injects power into the grid without a schedule, the same will be consumed in the grid even without the knowledge or consent of the distribution licensees. However, such injection of power is to be discouraged in the interest of secure and economic operation of the grid. In the present case, the expensive power was injected by the appellant without the knowledge or consent of the distribution licensee or agreement and without any schedule from SLDC. Admittedly, the appellant's power was high cost power for which none of the distribution licensees had any agreement with the appellant. Therefore, there is no substance in the contention of the appellant for compensation." (Emphasis added)

The above Judgments fortify the stand of the respondents that in the absence of Open Access agreement, the petitioner is not entitled to any compensation for the power pumped in by it.

The learned Senior Counsel relied upon the Judgment of the Hon'ble APTEL in Bangalore Electricity Supply Company Ltd. Vs. Reliance Infrastructure Ltd. – 2013 SCC Online (APTEL) 21. It is clear from the facts of the said case that there was an existing PPA between the licensee and the wind energy developer. On the eve of the expiry of the PPA, the developer approached the licensee for entering into wheeling and banking agreement. The SLDC granted NOC for execution of the wheeling and banking agreement between the developer and the licensee. Later, on two occasions the developer sent letters to the SLDC to permit wheeling of power from 30-09-2009 till the

wheeling and banking agreement was executed. The developer approached the licensee to permit it to pump the energy after expiry of the PPA pending execution of the wheeling and banking agreement. While no permission for such pumping was granted, the licensee has replied to the developer that pumping of power in the absence of an agreement was an issue between the SLDC and the developer and that the licensee will not have any liability towards the energy pumped by the developer. However, the developer has pumped energy into the Grid from 30-09-2009 and claimed compensation for the power so pumped till 14-10-2009 when the wheeling and banking agreement was executed. The licensee has sought to justify the delay in entering into PPA on account of non-installation of ABT meters and payment for the power injected till entering into PPA was denied on that ground. In the said facts and circumstances, both the State ERC as well as the Hon'ble APTEL have concurrently held that admittedly ABT meters were not used to measure electricity at any point of time even after their installation and that therefore there was no justification to delay entering into wheeling and banking agreement on the ground of non-installation of ABT meters .

We wonder how this Judgment could be of any help to the petitioner who admittedly has not informed the SLDC, much less, its permission was sought for pumping the power into the Grid. Further, it could not take its

purported LTOA applications to their logical end and invoke the proviso to Clause 10.6 of Regulation No.2 of 2005.

The learned Senior Counsel for the petitioner submitted that never was there any complaint that the power injected by the petitioner disturbed the State Grid. We are afraid, we cannot countenance this submission. Under the Scheme of the 2003 Act and the extant Regulations, power cannot be injected without the approval of the SLDC. Unless the Grid capacity is assessed and availability of the Grid capacity to bear the injected power is ascertained, power cannot be injected into the Grid. Therefore, it is not the question of absence of any complaint but it is one of the developer not complying with all the procedural requirements envisaged under law.

Sri P. Sri Raghuram next argued that the fact that monthly reading was taken shows that the respondents were aware of the petitioner injecting the power into the Grid. In our opinion, this argument is also not worthy of credence. When there is a requirement of law to be followed, especially for the purpose of maintaining the Grid safety and security, unauthorized act even on the part of the respondents cannot clothe the unlawful activity of the petitioner with any legitimacy. The petitioner has not placed before the Commission the circumstances under which the meter readings were taken and the designation of the personnel who have taken the meter readings. From the mere taking of meter readings, the knowledge of SLDC cannot be

presumed. Even if the meter readings were taken, that would not constitute compliance with the statutory requirement of existence of Open Access agreement.

It is trite to observe that the Grid safety and security cannot be compromised at any cost. Unless the SLDC is apprised of the fact of injection of power over and above what has been authorized either under the PPAs or under Open Access agreements, there is a potential danger of the Grid collapse by such unauthorized injection of power. This should be discouraged in all events. No latitude whatsoever can be shown in this regard on misplaced feelings of equity or sympathy. As observed earlier, the petitioner being a corporate entity running the power plants for more than two decades, it was not expected to resort to the illegal activity of pumping its power into the Grid after the expiry of the wheeling agreements without entering into Open Access agreements for whatever reason. We have therefore no hesitation to hold that injection of power by the petitioner into the Grid from the period of expiry of the wheeling agreements till the date of entering into the Open Access agreements is wholly unauthorized and unlawful.

Point No.3 : Sri P. Sri Raghuram, learned Senior Counsel, has advanced the following submissions in respect of the petitioner's claim for payment :

(i) The petitioner/its predecessor was holding wheeling agreement and that pending renewal of an agreement for the period after the expiry of such

wheeling agreement, the relationship between the petitioner and the licensee continues and therefore injection of power during the interregnum cannot be treated illegal.

(ii) As per Clause 10.5 of Regulation No.2 of 2006, actual generation by wind, mini-hydel and solar generators during the month shall be deemed as scheduled energy, and that there is no requirement of giving separate schedule for injection of power into the Grid.

(iii) Even in the absence of a formal Open Access agreement, the petitioner is entitled to be compensated for the power put into the Grid by it and availed by respondent No.2 in terms of Section 70 of the Indian Contract Act.

Sri P. Shiva Rao, learned Standing Counsel for the respondents opposed the above submissions.

We shall discuss these points in sequence.

As regards the first submission, the very premise on which it has been advanced is inherently flawed. The legal environment under which the wheeling agreement was entered has undergone a sea change by the time of expiry of the tenure of the wheeling agreement. As discussed in detail in Point No.2, the concept of wheeling charges was done away with under the new legal regime and the facility of Open Access has been introduced thereunder. As elaborately discussed, a specific procedure has been laid down for obtaining Open Access. In this changed scenario, it is wholly idle for the

petitioner to plead that the relationship created under the wheeling agreement will continue even in the absence of any fresh agreement for Open Access. It does not require further reiteration that once the wheeling agreement comes to an end, the relationship between the developer and the licensee will automatically come to an end and until a new relationship is formed, the developer is placed in the position of a third party/stranger vis-à-vis the licensee. This submission is therefore without any merit.

As regards the second submission, the learned Senior Counsel sought to derive support based on Clause 10.5 of Regulation No.2 of 2006. The said provision reads as under :

"In case of wind and mini hydel OA generators the actual generation during the month shall be deemed as scheduled energy. For the purpose of settlement in respect of scheduled/OA consumer availing supply from these OA generators, the actual generation during the month will be apportioned for each time block of the month and deviations reckoned accordingly."

Relying upon the above provision, the learned Senior Counsel submitted that no separate scheduling need be furnished by the petitioner. This submission has no merit. In the first place, Regulation No.2 of 2006 applies only to Open Access generators, scheduled consumers and Open Access consumers as envisaged under Clause 3 thereof. Till the petitioner entered into Open Access agreement, it did not fall in any of the above categories. Therefore, this Regulation has no application to the petitioner's case. Secondly, Clause 4

of the said Regulation mandates inter alia that each Open Access generator shall provide a wheeling schedule in the format as at Appendix-1(a), to the SLDC/Discom for each 15 minute time block for the day on a day ahead basis by 10 A.M. on the day preceding the commencement of the first time block for which the wheeling of energy is scheduled with a copy each to the STU (A.P. Transco) and the Discom concerned. Under Clause 6 thereof, SLDC/Discom is vested with the power to modify the schedules at any time in accordance with the Grid Code and Open Access Regulation. Under Clause 7.4, SLDC shall finalize the energy account of the Open Access transactions of a billing month with the assistance of EBC and arrive at the deviations for each time block and the consequent adjustments integrated over the month in respect of all Open Access Generators, scheduled consumers and the Open Access consumers in accordance with the procedure specified in the Regulation. Clause 8 provides for the detailed procedure for settlement of energy/demand in respect of the scheduled consumers. Clause 9 envisages settlement of energy at Exit Point in respect of Open Access consumers and Clause 10 provides for settlement of Open Access generators at the Entry Point. Clause 10.5 has therefore to be understood in the light of the entire scheme of the Regulation as discussed above and the same cannot be read in isolation. So read, it is clear that this Clause does not create any exception to Clause 4 which mandates each Open Access generator to provide a wheeling

schedule. All that it envisages is while settling the bills, the actual generation shall be treated as deemed scheduled energy and deviations are calculated accordingly. The petitioner therefore cannot take shelter under Clause 10.5 to justify its action of injecting power into the Grid without giving specific schedule. Admittedly, the petitioner has not invoked Clause 10.6 of Regulation No.2 of 2005 which provides for deemed approval of LTOA and given any schedule during any time block all the years when it injected power into the Grid after expiry of the wheeling agreement and before entering into agreements for STOAs. In the absence of conveyance of such schedule, the injection of power by the petitioner, far from being in conformity with Regulation No.2 of 2005, the same is in utter violation of the said Regulation.

As regards the third submission, the learned Senior Counsel submitted that the fact that the respondents have not raised any demur and utilized the power pumped in by the petitioner into the Grid after taking meter readings entitles the petitioner to claim compensation under Section 70 of the Indian Contract Act. To buttress his submissions, the learned Senior Counsel relied upon the Judgments of this Commission in Siflon Drugs Vs. A.P. Transco (O.P.No.30 of 2016, dt.31-3-2018) and M/s. Vibrant Greentech India Pvt. Ltd. Vs. APSPDCL and others (O.P.Nos.9 and 20 of 2020, dt.5-7-2021). In the first mentioned Judgment, the predecessor of the petitioner therein had a wind power wheeling agreement dated 31-3-1995 with the erstwhile APSEB and

the said agreement was valid till 22-5-2015. One day after taking over the management of the previous company, the developer addressed the licensee regarding the transfer of management and before the expiry of wheeling agreement it has requested the licensee to transfer the same in their name and start giving credit to the power generated and unutilized banked units. The approval was however granted only on 22-7-2015. The licensee has entered into agreement only on 14-6-2016. On those facts, this Commission held as under :

"9. Irrespective of any technicalities, the petitioner is similarly situated almost in every respect as the eligible generators under the said Wind Power Policy of 2015 and is identically placed as those entitled to the benefits of Appendix-3, 3.f of Regulation 2 of 2006. The pleadings and the documents clearly disclose that the petitioner was prompt in approaching the authorities at every stage and it was not at fault for the absence of any specific agreement between the parties between 22-05-2015 to 14-06-2016, while admittedly the earlier Agreement was in force between 23-03-2015 to 21-05-2015. The correspondence clearly shows that the petitioner approached the 3rd respondent within two days of acquiring the wind power plant and promptly approached the 1st and 2nd respondents on receiving the communication from the 3rd respondent etc., which are not in dispute and the pendency of the matter in correspondence between the parties was for most of the time with respondents 1 and 2. While one cannot take advantage of his own wrong, the narration in the rejoinder about the actual delay occurred is not factually seriously in controversy. If so, the respondents to whose knowledge the power was evacuated into the grid throughout cannot throw the blame for the absence of an Agreement during the relevant period on the petitioner. Whatever energy was evacuated into the grid was admittedly the subject of regular meter readings and in view of the amendments affected to Regulation 2 of 2006 by Regulation 2 of 2016, the petitioner is entitled to the pooled cost of power purchase for the quantum of power generated by its unit and evacuated into the grid during the period which was never intended to be

gratuitous. In the absence of any prohibition under the special Laws and Rules governing electricity, the principle under the Indian Contract Act that a person who received the benefit of a non-gratuitous act is liable to pay the value of the benefit to the person who conferred it should also apply. As such in any view, such a relief has to be granted to the petitioner."

As evident from the above noted facts, this Commission has categorically found that the delay in entering into agreement was not due to the fault of the developer and that therefore the developer cannot be denied the cost of the power fed into the Grid till the agreement was entered into. The facts in the said case and the present case bear no similarity as discussed in the foregoing. This Judgement is therefore of no avail to the petitioner.

As for the Judgment in M/s. Vibrant Greentech India Pvt. Ltd. Vs. APSPDCL and others (O.P.No.9 & 20 of 2020, dt.05-07-2021), PPA was entered between the developer and the licensee based on the model PPA approved by this Commission in terms of Clause 27(2) of Regulation 1 of 2015. No formal approval of this Commission was sought by either party and after getting the plant synchronized with the Grid, power was injected into the Grid by the developer. When the licensee denied payment for the power supplied by the developer in the absence of an approved PPA, the developer has approached this Commission inter alia for a direction to the licensee to act upon the PPA dated 30-3-2017 and to pay interest for the power generated and supplied from the date of entering into PPA with interest. While rejecting

the first mentioned prayer, this Commission, however, granted the second relief. The relevant part of the order reads as under :

"Admittedly, the projects were synchronized on 29-3-2017 and PPAs were entered on 30-3-2017. In pursuance of the said two documents, the respondents allowed the power to be evacuated into the Grid by the petitioners. At no point of time was any objection raised either by the functionaries of the Discom or by the SLDC officials. The respondents continued to avail the benefit of power supply from the petitioners till the power connections were disconnected in March 2020. Thus, the conduct of the parties i.e., supply of power by the petitioners on the one hand and receiving and utilizing the power without any demur on the other, constituted a fresh relationship between the petitioners and the respondents dehors the PPAs which formed the basis for a claim under Section 70 of the Contract Act. This transaction is separable from the obligations arising under the PPAs. Even though the PPAs are held to be unenforceable, the petitioners are nevertheless entitled for compensation under Section 70 of the Contract Act for the power supplied by them to respondent No.1."

In holding as above, this Commission has mainly relied upon the Judgment of the Apex Court in State of West Bengal Vs. B.K. Mondal & Sons (1962 Supp.(1) SCR 876 = AIR 1962 SC 779). This Commission has summed up the legal position regarding Section 70 of the Contract Act :

- Voluntary acceptance and enjoyment of the work by one party creates a cause of action for the other party to make a claim under Section 70;

- The word "lawfully" indicates that after something is delivered or something is done by one person for another not intended to be gratuitous and that thing is accepted and enjoyed by the latter, a lawful relationship is born between the two which forms basis for claiming compensation.

- Claim for compensation is based on the footing that there has been no contract and that the conduct of the parties in relation to what is delivered or done creates a relationship resembling that arising out of a contract.

In Vibrant Greentech India Pvt. Ltd., this Commission, based on the relevant facts such as synchronization of projects and entering into PPAs apart from the respondents therein allowing the power to be evacuated and meter readings having been taken, has allowed payment for the power supplied even while rejecting the relief of approval of PPA. There is nothing to bring the instant case into the fold of Section 70 of the Contract Act as the relationship between the petitioner and the licensee has ended with the expiry of wheeling agreement and no further relationship exists resembling that arising out of a contract which is sine qua non for the application of Section 70. Moreover, pumping of energy into the Grid without the knowledge and approval of SLDC is unlawful which makes the case fall out of Section 70 of the Contract Act.

Point No.3 is therefore held against the petitioner.

In the light of the above discussion, the O.P. shall fail and the same is accordingly dismissed, however, without costs.

Sd/-	**Sd/-**	**Sd/-**
Thakur Rama Singh	**Justice C.V. Nagarjuna Reddy**	**P. Rajagopal Reddy**
Member	**Chairman**	**Member**